No. 18,681

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HEINRICH FRITZ BACHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLANT.

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FILED
NOV 4 1963
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On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an appeal from a judgment entered on April 3, 1963 by the United States District Court for the Southern District of California, Central Division, denying appellant's petition for naturalization [R. 63]. The petition for naturalization was brought to the United States District Court as a naturalization court under the authority of 8 U. S. C. A. 1421(a). The District Court's judgment of April 3, 1963, as a final order, is appealable to the United States Court of Appeals for the Ninth Circuit pursuant to the authority of 28 U. S. C. A. 1291, which provides that courts of appeals have jurisdiction of appeals from all final decisions of district courts. Appellant, on April 10,

1963, filed in the District Court a timely Notice of Appeal [R. 64] under 28 U. S. C. A. 2107 which was docketed in the United States Court of Appeals for the Ninth Circuit on May 21, 1963. This Court's jurisdiction therefore rests upon 28 U. S. C. A. 1291.

Statement of the Case.

This is a naturalization proceeding by Heinrich Fritz Bachmann to become a United States citizen.

Bachmann filed his petition for naturalization on January 3, 1962 [R. 2] under the general provisions Section 316 of the Immigration and Naturalization Act of 1952, 8 U. S. C. A. 1427. This act is hereinafter referred to as the INA. The designated examiner made his recommendation [R. 2-8] to the naturalization court, in this case the United States District Court for the Southern District, Central Division, on February 8, 1963, that said petition be denied on the ground that petitioner has failed to establish that he is not ineligible for citizenship by virtue of Section 315 of the INA because he has applied for and has been relieved from military service in the armed force of the United States because of alienage.

On March 18, 1963 the case was heard in the United States District Court for the Southern District, Central Division [R. T. 3-13]. The Court followed the recommendation of the naturalization examiner and denied the petition on the ground that petitioner has failed to establish that he is not ineligible for citizenship by virtue of Section 315 of the INA because he has applied for and has been relieved from military service in the armed force of the United States because of alienage. Findings of Fact, Conclusions of Law and

Judgment were filed on April 3, 1963 and the Judgment was entered on the same date [R. 62-63].

On April 10, 1963 a Notice of Appeal [R. 64] was filed by petitioner, and the case has now been brought for determination to the above entitled Court.

Statement of Facts.

Heinrich Fritz Bachmann, who had a record as a conscientious objector in Switzerland, his native country [Govt. Ex. C, 1-N, p. 2], was approved by the State Department for admittance to the United States as a permanent resident and arrived in this country on December 22, 1952 when he was twenty-five years of age.

On February 23, 1954 the Selective Service System refused to grant Mr. Bachmann permission to leave the United States on the ground that he was then subject to military service [Pet. Ex. A, R. 51].

The Immigration and Naturalization Service now wishes to deny citizenship to Mr. Bachmann because on a date prior to February 23, 1954 he had written a letter requesting exemption from military service as a treaty alien [R. 14].

To understand the events and happenings involved in this case we must go back to a date prior to Mr. Bachmann's entry into the United States. After the Second World War he had the opportunity to observe the devastation of postwar Europe which reinforced his religious convictions and led him, in the years 1949 and 1950 to refuse service in the Swiss Army in peacetime, and, as Switzerland has no provisions for conscientious objectors, he served his compulsory service

time in jail rather than in a training camp [Govt. Ex. C, 1-N, p. 2].

After his arrival in the United States and his registration with the Selective Service System, Bachmann was classified as I-A in July of 1953 [Govt. Ex. C, 1-C]. He did not officially bring up his conscientious objector beliefs at this time because he did not believe he would actually be called for induction, and, after his experiences in Switzerland, he was not anxious to reveal his principles unless it became absolutely necessary [R. 18].

In the fall of 1953 Mr. Bachmann inquired, through his Congressman, of Lewis B. Hershey, Director of the Selective Service System, as to how a classification as a treaty alien would affect his future ability to become a United States citizen. He was informed on October 6 by Mr. Hershey that it "might" make him permanently ineligible [Pet. Ex. D, R. 54].

On October 7 Mr. Bachmann appeared at the New York headquarters of the Selective Service System to initiate his request to be classified as a conscientious objector. However, after an interview with Colonel Akst he decided instead to write to his draft board a letter requesting IV-C status as a treaty alien [Pet. Ex. E, R. 55]. This he did on October 9, 1953, delivering his letter in person [R. 22], and being handed in return a blank form entitled "Application by Alien for Exemption from Military Service in the Armed Forces of the U.S.", which he discovered, probably that same evening, to contain on its bottom half the provisions of Section 315 INA [Govt. Ex. C, 1-C, 1-G1].

On October 14 the notice of his classification as a treaty alien was mailed to him, but before such classi-

fication became final, he filed a Notice of Appeal [Govt. Ex. C, 1-K] requesting to be classified I-0 as a conscientious objector, and requesting a personal interview to clarify his position. He was then mailed the form 150 required of conscientious objector claimants, which he filled out and returned [Govt. Ex. C, 1-N, pp. 1-4], and appeared before the board in person on November 24, 1953. The board the same day, by a vote of 5-0, decided the information did not warrant reopening the case and forwarded it to the appeal board [Govt. Ex. C, 1-C].

The appeal board, on December 29, 1953, acting on Bachmann's appeal for change of classification from IV-C to I-0, reclassified him V-A by a vote of 5-0 [Govt. Ex. C, 1-C, p. 2].

The next significant date is the one previously mentioned, when on February 23, 1954 his local draft board denied him permission to leave the United States.

Specification of Errors Relied On.

1. The District Court erred in finding that appellant was relieved from training and service in the armed forces of the United States because of alienage.

2. The District Court erred in placing the burden of proof of eligibility for citizenship, in reference to Section 315, Immigration and Naturalization Act of 1952, on the petitioner.

3. The District Court erred in failing to make specific findings of fact as to whether under the facts of the case appellant had the opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship, and as to whether appellant was a conscientious objector.

4. The District Court erred in failing to find that appellant, as an alien in permanent residence, was not entitled to exemption from military service as a treaty alien, and that therefore Section 315 INA is not applicable to him.

Questions Presented.

1. Was Bachmann, who timely appealed his IV-C classification, requesting I-O classification, and who as a result of such appeal was re-classified V-A, and who subsequently was denied permission by his draft board to leave the United States, relieved from military service as a treaty alien?

2. Was Section 315 INA a penalty, and if so was Bachmann deprived of due process by having the trial court impose on him the burden of proof to show that he did not violate Section 315 and that therefore he was eligible for citizenship.

3. A. Was Bachmann given the opportunity to make an intelligent election between military service and citizenship and exemption from service and no citizenship?

B. Was Bachmann a conscientious objector and therefore entitled to exemption from military service because of his religious beliefs?

4. Was Bachmann, who was admitted to the United States as a permanent resident, entitled to exemption from military service as a treaty alien?

ARGUMENT.

I.

Heinrich Fritz Bachmann Was Never Relieved From Military Service as a Treaty Alien.

After the series of events referred to in appellant's Statement of Facts, and after receiving his IV-C classification on October 14, 1953, Bachmann became alarmed as to the consequences of such classification [R. 23], and filed his appeal for reclassification to I-O on October 23. This appeal was then considered by the appeal board.

32 C. F. R. Section 1626.25 contains the special provisions governing an appeal which involves a claim that the registrant is a conscientious objector, and reads in part, as it was in force at that time:

> "(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:
>
> (3) . . . the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-0. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-0, but does find that the registrant is eligible for classification in Class I-0, it shall place him in that class.
>
> (4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-0 or in Class I-0, it shall transmit the entire file to the United States Attorney for the judicial district in which the of-

> fice of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice."

It is clear from the record that the board decided to classify Bachmann V-A, a classification which does not exempt from military service but makes the registrant eligible for service if the conditions so require. This is corroborated by the fact that two months later he was refused permission to leave the country by his draft board.

If the appeal board wished to refuse Bachmann's appeal, it could have indicated in the record that he was a treaty alien exempt from military service, in which case, as a Swiss citizen, he should not have been barred from leaving the United States.

The government should be estopped from now claiming that Bachmann should be barred from citizenship as a treaty alien because of a mere attempt on its part to classify him IV-C.

II.

Section 315 INA Is a Penalty Clause and as Such Required the Safeguards of the Fifth and Sixth Amendments to the United States Constitution, and It Was a Denial of Due Process to Impose on Bachmann the Burden of Proof to Show That He Did Not Violate Said Clause.

In the case of *In re Naturalization of Browne* (1962), 180 A. 2d 911 on page 912 the Court states in reference to Section 315:

> "It is obvious that for a permanent resident in this country to be declared permanently ineligible for United States citizenship is a grave matter

indeed. It is like telling someone who lives in the country that he may not fill his lungs to the utmost with fresh air. It must be a knell of doom constantly sounding in the ears of a permanent American resident that he may not breathe fully the air of liberty and opportunity which everybody else may enjoy. Thus, considering the solemn sanctions involved through application of the statute in question, it must be construed strictly.

Judge Hastie, United States Circuit Court Judge of the Third Circuit, well said that:

'The deprivation of the privilege of acquiring citizenship, which an alien in permanent residence normally enjoys, is a substantial penalty. A statute which attaches such a penalty to certain conduct *should be construed strictly to avoid an imposition which goes beyond the manifest intent of Congress.*' (Emphasis supplied.) (Petition of Rego, 3 Cir., 289 F. 2d 174.)"

Here we have two Courts which consider said statute to be a penalty.

In the case of *McGrath v. Kristensen* (1950), 340 U. S. 162 [71 S. Ct. 224], where the United States Supreme Court refers on page 172 to a clause barring an alien from citizenship on the ground that he requested an exemption from military service, the Court labels it a "penalty clause."

In the case of *Kennedy v. Mendoza-Martinez* (1963), 372 U. S. 144 [83 S. Ct. 554], the court discusses the test as to whether an Act of Congress is penal or regulatory in character on pages 168-169:

"Whether the sanction involves an affirmative disability or restraint, whether it has historically been

> regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of the statute, these factors must be considered in relation to the statute on its face."

It seems that in the instant case the punitive nature of the statute is obvious on its face, and, in addition, it meets the test as outlined above. This conclusion in regard to Section 315 has been reached by the courts in the *Petition of Rego* (1961), 289 F. 2d 174, and *In re Petition of Browne, supra.*

The Supreme Court in the *Kennedy v. Mendoza-Martinez* case, *supra,* held that once having established that an Act of Congress is penal in nature, then the safeguards of the Fifth and Sixth Amendments to the United States Constitution—that a prior criminal trial with all its incidents must be complied with before the sanctions of such a section be imposed—are mandatory.

In the instant case, not only has Bachmann been deprived of the procedural safeguards required as incidents of a criminal prosecution, but the trial court has imposed upon Bachmann the burden of proving that he is not ineligible to become a citizen by virtue of Section 315 of the INA [R. 63].

III.

Appellant Had No Opportunity to Make an Intelligent Election Between Exemption and No Citizenship, and No Exemption and Citizenship, and Furthermore, as a Conscientious Objector, He Was Entitled to Be Exempt From Military Service Because of His Religious Beliefs.

In the case of *Moser v. United States* (1951), 341 U. S. 41 [71 S. Ct. 553], speaking for the Court, Justice Minton said:

> "Petitioner did not knowingly and intentionally waive his rights to citizenship. In fact, because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. Johnson v. United States, 318 U. S. 189, 63 S. Ct. 549, 553, 87 L. Ed. 704. To hold otherwise would be to entrap petitioner."

The Court in the *Moser* case demands that *scienter* must be present before Section 315 INA can be invoked. It is appellant's position that the trial court failed to make a finding on this point, even though this issue was raised by Bachmann.

The record indicates that Bachmann, after having been classified I-A, inquired through his congressman of Lewis B. Hershey, Director of Selective Service, as to whether classification as IV-C would bar him from citizenship. Mr. Hershey's letter dated October 5 to Mr. Holtzman [R. 53-54] states that such ap-

plication and relief on such ground "might" permanently bar him from citizenship.

Bachmann went to Selective Service headquarters in New York on October 7, 1953 to initiate his request to be classified as a conscientious objector. During his lengthy interview with Colonel Akst, he expressed his opinion that he was entitled to a IV-C classification as a treaty alien but he refused to sign the statement on the form being provided by the local boards. He was then advised he could also be classified IV-C if he writes his own statement, but that he would then be either given or mailed Section 315 of the INA [R. 55].

On October 9 he filed, in person, with the clerk of the local draft board, his request for IV-C classification and was handed a blank form 294 which contains on the lower half Section 315 of the INA. He did not look at the paper at that time but read it at home, probably the same evening [R. 22].

In his deposition, in reference to his reading Section 315 of the INA, the following question and answer is found [R. 23]:

> "Q. Did you, in reading this statement, realize that you would be barred from citizenship because of your request for an exemption? A. I was not sure because I had previously been told that you would be barred from citizenship if you signed the form, but not having signed the form I did not know what the consequences might be. During a visit to the Selective Service Head Office in New York, while discussing my military status, Colonel AKST indicated that my request for exemption, dated October 9, 1953, would not necessarily bar me from citizenship as it would if I were signing the prescribed form."

This statement is uncontroverted by the government.

The evidence shows that Bachmann was uncertain as to the consequences of his letter requesting exemption as a treaty alien, but that after reading Section 315 INA he became concerned, and as a result filed his Notice of Appeal for change of classification to I-O.

The facts of the case prove that Bachmann's attempts to change his status from I-A classification were motivated by his religious beliefs as a conscientious objector, but the Court fails to make any specific finding as to whether Bachmann was a conscientious objector.

The evidence further proves that at the time he applied for IV-C classification he did not have sufficient information to make an intelligent waiver of his right to citizenship as required by the *Moser* case, *supra.*

In the case of *Brunner v. Del Guercio* (1958), 259 F. 2d 583, the Court held on page 586 that in naturalization proceedings where the issue arises as to whether the petitioner knowingly and intentionally waived his rights to citizenship by claiming exemption from the armed forces, a finding on that issue by the District Court is essential. In the case at bar the District Court made no such finding, but the overwhelming weight of evidence can support only one finding—that Bachmann had no opportunity to make an intelligent election as outlined in the *Moser* case.

IV.

Permanent Resident Aliens Are Treated Like Citizens in That They Have the Same Unqualified Obligation to Render Military Service as Do Citizens.

It is an admitted fact that Bachmann has been a permanent resident of the United States since December 22, 1952. Conclusion of Law No. 1 [R. 63] is erroneous in that it refers to appellant as a resident alien, and is inconsistent with Finding of Fact No. 2 [R. 62] which states that petitioner was admitted for permanent residence.

Assuming without conceding that Bachmann was exempted from military service, it is appellant's contention that a permanent resident cannot claim exemption as a treaty alien, and that if he has been erroneously exempted by the government, he should not be penalized for knowing less about the Selective Service System than the Selective Service System itself.

In the case of *In the Matter of the Petition of Rego, supra,* the Court held that permanent residents cannot claim exemption as treaty aliens, and the Court stated, in regard to the fact that the local draft board for a time classified Rego as exempt from military service, on page 177:

> "But for present purposes this temporary disregard of the selective service law is of no consequence. All that matters is that Dominguez Rego was not a member of that class of aliens 'in the United States in a status other than that of a permanent resident', to which the proviso imposing debarment from naturalization applied."

Clearly the statute classifies all permanent residents in the same category as citizens in regard to their obligation to render military service.

Since Bachmann was not legally entitled to be relieved from military service, then is the fact of relief sufficient to bring into effect Section 315 INA? Our answer is no. A statute either does apply or does not apply to a given fact situation. For example, in the *Rego* case, *supra,* the Court on page 177 states:

> "However, the government urges that the court below should be given an opportunity to consider 'the effect of the subsequent service in the Armed Forces of the United States' on the rights of the appellant. Such reconsideration in the court below would be pointless in the light of our ruling that Section 315 (a) is not controlling in the agreed circumstances of this case."

By analogy, how can the penalties of Section 315 be invoked against the appellant who is clearly not a member of the class of persons to whom said statute is applicable?

We recognize that in the case of *Ungo v. Beechie* (1963), 311 F. 2d 905 this Court holds that it is the fact of relief, not the legal right to it, that is determinative, but we respectfully request that this position be reconsidered, especially in the light of the penal nature of the statute.

In view of the penal nature of Section 315 INA, the statute should be strictly construed and its sanctions not imposed on the appellant, who is not within the class for whom the statute was designed.

Conclusion.

For the reasons stated, it is respectfully submitted that the District Court's judgment denying appellant's petition for naturalization be reversed, and the cause remanded with the instructions that the appellant be admitted to United States citizenship.

Dated, Los Angeles, California, October 31, 1963.

Respectfully submitted,

MILAN MOACANIN,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: October 31, 1963.

MILAN MOACANIN,
Attorney for Appellant.

TABLE OF EXHIBITS.

Exhibit	Record Page	Reporter's Transcript Page
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